2015

State of Utah, Plaintiff/Appellee, vs. Michael Rowan and Rebecca George, Defendants/Appellants

Utah Supreme Court

IN THE SUPREME COURT OF UTAH

STATE OF UTAH, **Plaintiff/Appellee,** **vs.** MICHAEL ROWAN AND REBECCA GEORGE**,** **Defendants/Appellants.**	**Case No. 20150598-SC**

BRIEF OF AMICUS UTAH COUNCIL ON VICTIMS OF CRIME

Appeal from a final order dismissing the charges against defendants, which dismissal was entered on the ground that the district court's orders suppressing evidence substantially impaired the prosecution's cases, in the Fourth Judicial District, Utah County, the Honorable Derek P. Pullan presiding.

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The Utah Council on Victims of Crime is the statewide agency charged with promoting the rights of crime victims in the state. Chaired by James M. Swink, Esq., it is comprised of more than 20 members from diverse agencies and backgrounds. The Council is concerned that an independent state exclusionary rule suppresses reliable evidence against dangerous criminals, thus helping them to escape punishment and revictimize victims. The Council has been involved in legislative efforts to eliminate the state exclusionary rule since 1993.

SUMMARY OF THE ARGUMENT

I. The Court should revisit the issue of whether article I, section 14 of the Utah Constitution contains an exclusionary rule. The decision announcing the existence of an exclusionary rule (*State v. Thompson*, 810 P.2d 415, 419 (Utah 1991)), was not based on full briefing before the Court and the miscited controlling precedent on the issue.

II. Utah's constitutional history and traditions reject a state exclusionary rule. Nothing in the text of article I, section 14, suggests that evidence should be suppressed, as this Court explained in *State v. Aime*, 220 P. 704 (Utah 1923). Moreover, article I, section 14 is separate from the trial-related criminal procedure provision of the Utah Constitution. In addition, when the Utah Constitution was drafted, no appellate court in any state had excluded unlawfully obtained evidence under its constitution – a common-law approach that Utah's Constitution presumably tracked. Finally, the first Utah legislature created its own

remedies for violations of the search and seizure provisions – remedies that did not include the suppression of reliable evidence.

III. Contemporary attitudes in Utah are against an independent state exclusionary rule. The State's elected representatives have clearly voted against excluding reliable evidence in 1982 and 1994.

IV. Other states that have created an independent state exclusionary rule have frequently done so on the basis of their own unique state constitutional language or practice. These precedents are therefore of little relevance to construing Utah's search and seizure provision.

V. An independent state exclusionary rule is poor public policy. First, an independent exclusionary rule creates litigation that complicates search and seizure, rather than simplifying it as was the original aim. *See State v. Bolt*, 689 P.2d 519, 527 (Ariz. 1984) ("one of the few things worse than a single exclusionary rule is two different exclusionary rules."). Second, an independent state exclusionary rule is unlikely to deter illegal police activity. It will apply only in situations where the United States Supreme Court has upheld the police activity in question, circumstances unlikely to produce deterrence. Third, the state exclusionary rule will operate only in situations where its application is a disproportionate response to the violation of a constitutional right. It will operate only in situations where reasonable minds can differ – i.e., only in situations where at least five Justices of the U.S. Supreme Court have found the police practice at issue to be reasonable. And yet it requires

the suppression of reliable evidence, even where that evidence is necessary to convict a guilty criminal to prevent him from victimizing others.

ARGUMENT

I. THIS COURT SHOULD REVISIT THE ISSUE OF WHETHER ARTICLE I, SECTION 14 OF THE UTAH CONSTITUTION CONTAINS AN EXCLUSIONARY RULE.

This Court has effectively interpreted Utah's prohibition of unreasonable searches and seizures -- article I, section 14 -- as containing its own exclusionary rule that operates independently of the federal exclusionary rule. The way in which that law has developed, however, warrants reexamination of that conclusion.

The existence of an independent state exclusionary rule was first suggested by two justices of this Court in *State v. Larocco*, 794 P.2d 460 (Utah 1990). The two-justice plurality opinion did not command a majority of the Court. Yet in spite of that fact, this full Court then apparently assumed that *Larocco* was controlling law a year later in *State v. Thompson*, 810 P.2d 415, 419 (Utah 1991), when it inaccurately cited the *Larocco* plurality opinion without noting that it was not controlling authority. *See* 810 P.2d at 419 (citing plurality opinion without designating it as a plurality opinion). The *Thompson* opinion contains only a single sentence on this critical issue – a single sentence that simply (mis)cites the *Larocco* plurality as controlling authority on the existence of a state exclusionary rule.

Because of the cursory treatment of the issue, it appears that *Thompson* may have overlooked early Utah Supreme Court decisions contradicting the *Larocco* plurality's suggestion that Utah has its own exclusionary rule. *See State v. Walker*, 2011 UT 53, ¶ 28, 267

P.3d 210, 216 (Lee, J., concurring) (noting that Thompson "casually cast aside settled, longstanding precedents of this court that held" against a state exclusionary rule). In *State v. Aime*, 220 P. 704 (1923), this Court unanimously held that article I, section 14 did not permit the suppression of reliable evidence. This Court observed that the United States Supreme Court's decision in *Weeks* (creating a federal exclusionary rule under the Fourth Amendment) was "not binding on state courts in interpreting similar provisions of their own state Constitutions." 220 P. at 705-06. This Court quoted extensively from the opinions of state courts and Wigmore's evidence treatise to the effect that "[t]he judicial rules of evidence were never meant to be an indirect process of punishment." *Id.* at 705. And, noted this Court, "The law cannot be justly administered without a knowledge of the facts in dispute. The purpose of evidence is to establish the truth in legal tribunals, in order that justice may be done." *Id.* at 707. This Court therefore held: "With the profoundest respect for the high tribunal which has reached a contrary conclusion, we are led by the force of what we deem the better reason to conclude with the vast majority of state courts that the admissibility of evidence is not affected by the illegality of means through which it has been obtained." *Id.* at 708.[1]

Thirty-seven years later, this Court reaffirmed *Aime* on the eve of the *Mapp* decision. In *State v. Fair*, 353 P.2d 615, 615 (Utah 1960), this Court followed *Aime*, holding that "[i]t is

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[1] Interestingly, one of the members of the unanimous *Aime* Court was Samuel R. Thurman, who as a delegate to the Utah Constitutional Convention was actively involved in discussions on the provisions of article I and on the responsibilities of the state judiciary. Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 UTAH L. REV. 751, 790.

not necessary to determine whether or not the search was legal, because this court has previously held that evidence, even though illegally obtained, is admissible."

After *Mapp*, this Court followed in "lockstep" with federal law in applying a state exclusionary rule. So none of these decisions is particularly instructive on what the state constitutional history and traditions mean. *See Larocco*, 794 P.2d at 471 (plurality opinion) (Utah Supreme Court followed the federal lead "somewhat grudgingly"). The most that can be said of these cases is that they "implicit[ly]" recognized a state exclusionary rule. *See id.* at 472 (plurality opinion).[2] Because of this lack of any explicit consideration of the issue, the unanimous 1923 *Aime* opinion – which was reaffirmed in *Fair* in 1960 and not questioned by even a single justice on the Utah Supreme Court as a matter of state constitutional law until 1990 – would seem to be entitled to special deference. Yet that deference was not given when this Court created a state exclusionary rule in *Thompson* without any discussion of the issue.

Amicus Utah Council on Victims of Crime respectfully requests this opportunity to provide full briefing to the Court (with, of course, a response from the appellant) on the important issue of whether Utah's Constitution requires the suppression of reliable evidence when it has been obtained by law enforcement agents who have followed federal constitutional requirements. To be sure, *Thompson* makes an independent exclusionary rule the current law of the state. But the Utah Council on Victims respectfully submits that,

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[2] *See* Cassell, *supra*, 1993 UTAH L. REV. 751, 784-88 (reviewing these cases and concluding that they "fail to provide analytical support for an independent state exclusionary rule").

through this brief, it can clearly establish that this decision establishing the independent state exclusionary rule is "erroneous . . . and that more good than harm will come by departing from [the] precedent." *State v. Mauchley*, 2003 UT 10, ¶ 11, 67 P.3d 477, 481 (Utah 2003). Indeed, this Court has overruled a prior precedent when the earlier precedent "not only failed to explain why [it] was abandoning the long-established [previous] rule . . . but failed to cite that line of cases altogether." *State v. Menzies*, 889 P.2d 393, 399 (Utah 1994). *Thompson* miscited *Larocco* as controlling law and thus failed to explain why it was adopting an independent state exclusionary rule that had been rejected in Utah since the State's founding. *See State v. Walker*, 2011 UT 53, ¶ 45, 267 P.3d 210, 221 (Lee, J., concurring) ("*Thompson* thus relied on the *Larocco* plurality for the existence of a Utah exclusionary rule without acknowledging that the *Larocco* rule had never commanded a majority and without any discussion of the court's contrary precedent or of the history and text of article I, section 14.").

Reconsideration of the state exclusionary rule question is appropriate for one additional reason: In neither *Thompson* nor *Larocco* did the Court receive full briefing on the issue of whether article I, section 14 contains an exclusionary rule. In *Larocco*, appellant Larocco did not provide any briefing to support an independent exclusionary rule, simply assuming that exclusion of evidence was part of article I, section 14. Similarly, in *Thompson*, none of the briefs substantively discussed the state exclusionary rule (or even cited *State v. Larocco*, for that matter).

The issue of an independent state exclusionary rule is an important one that deserves careful consideration from this Court – after full and fair briefing from interested groups, such as the Utah Council on Victims of Crime. The Court should therefore consider the question carefully in this case – where the issue has been fully briefed. The Court should conclude that suppression of reliable evidence is not a permissible remedy for violations of article I, section 14.

II. UTAH'S CONSTITUTIONAL HISTORY AND TRADITIONS REJECT A STATE EXCLUSIONARY RULE.

When interpreting a state constitutional provision, the Court's "goal is to ascertain the drafters' intent." *State v. Hernandez*, 268 P.3d 822, 824 (Utah 2011); *accord DIRECTV v. Utah State Tax Comm'n*, 2015 UT 93, ¶ 47, 364 P.3d 1036, 1049 (looking to the meaning of provisions in other state constitutions "at the time of the ratification of the Utah Constitution"); *Tintic Standard Mining Co. v. Utah Cty.*, 15 P.2d 633, 637 (Utah 1932) ("[T]erms used in [the Utah] Constitution must be taken to mean what they meant to the minds of the voters of the state when the provision was adopted."); *State* ex rel. *LLoyd v. Elliott*, 44 P. 248, 250 (Utah 1896) (looking to the intent of "the framers of our constitution" to determine the "the meaning attributed to the term 'writ of quo warranto'" in article VIII, § 4 of the Utah Constitution); *see also* Jeremy M. Christiansen, *Some Thoughts on Utah Originalism: A Response*, 2014 UTAH L. REV. ONLAW 1, 9 n.60, 10 n.61–67, 11 n.68 (collecting cases from Utah's founding era which endorsed originalism and rejected alternative, policy-based approaches to interpreting specific constitutional provisions). The

conventional tools for proper state constitutional interpretation have been set out at length in other opinions and include such things as constitutional text, drafting history, contemporary understandings, structural analysis of the Constitution, and contemporary public attitudes. *See generally American Bush v. City of South Salt Lake*, 2006 UT 40, 140 P.3d 1235 (Utah 2006); *State v. Walker*, 2011 UT 53, ¶ 45, 267 P.3d 210, 221 (Lee, J., concurring) (discussing this point with reference to Utah Const., art. I, § 14). All of these conventional interpretive tools point against a state exclusionary rule. *See generally* Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 UTAH L. REV. 751.

A. The Text of Article I, Section 14 Does Not Support An Exclusionary Rule.

When interpreting the state's constitution, this Court "look[s] first to the plain meaning of the constitutional provision at issue." *State v. Willis*, 2004 Utah 93, ¶ 4, 100 P.3d 1218, 1219 (Utah 2004). Like the Fourth Amendment, article I, section 14 makes no reference to the exclusion of evidence as a remedy for a violation. As this Court explained in *Aime*, "no authority, so far as we have been able to discover, has suggested that the subsequent use of articles [illegally] taken as evidence is in itself any part of the unlawful invasion of such constitutional guaranty." *Aime*, 220 P. at 706 (internal quotation omitted); *see also State v. Walker*, 2011 UT 53, ¶ 47, 267 P.3d 210, 221 (Lee, J., concurring) (art. I, § 14 "simply provides a guarantee of security against unreasonable searches and seizures and a prohibition on warrants without probable cause. It says nothing about an exclusionary—or any other—remedy for the violation of its provisions").

In response, one might argue that because the United States Supreme Court has adopted the exclusionary rule to deter violation of the Fourth Amendment, the parallel provision of article I, section 14 likewise contains such a rule. But such an approach is essentially an argument for "lockstep" interpretation of the federal and Utah constitutions, an interpretative approach a majority of this Court has rejected in other contexts. *See, e.g.*, *Flowell Elec. Ass'n, Inc. v. Rhodes Pump, LLC*, 2015 UT 87, 361 P.3d 91, 98 ("we do not presume that federal court interpretations of federal Constitutional provisions control the meaning of identical provisions in the Utah Constitution"). Moreover, the federal exclusionary rule no longer rests on a constitutional interpretation of the Fourth Amendment. Instead, the Supreme Court now views the rule as a "judicially-created remedy." *See, e.g.*, *Davis v. United States*, 564 U.S. 229, 238 (2011) (the cases acknowledge "the exclusionary rule for what it undoubtedly is—a 'judicially created remedy' of this Court's own making"). The Utah Constitution creates a sharper division of powers, see Utah Const., Art. V, which means that this Court does not have the same sort of free-ranging remedial powers as the U.S. Supreme Court. *See generally* Cassell, *supra*, 1993 UTAH L. REV. at 827-33.

In addition, differences between the federal and Utah constitutional structures likewise argue against a state exclusionary rule. The federal Bill of Rights contains *trial*-related procedural provisions in at least two different amendments, the Fifth and the Sixth. In contrast, the Utah Constitution concentrates the trial provisions in one section. The section dealing with the rights of accused persons, article I, section 12, list various rights

(such as the right to counsel, right to confront witnesses, and the right to speedy trial). None of the other sections of the Declaration of Rights contains trial-related procedural provisions.[3] It is reasonable to suppose that if the drafters of the search and seizure provision had viewed it as creating a right of the "accused" applicable "[i]n criminal prosecutions," they would have incorporated the provision with the other trial-related rights in section 12.

B. The drafting history at the Utah Constitutional Convention provides no support for an exclusionary rule

Review of the available materials strongly suggests that the framers of the Utah constitution did not intend to create a state exclusionary rule. The records of the Utah Constitutional Convention shed little direct light on the framers' intent in drafting article I, section 14, as the Convention records from March 25, 1895 reveal only that "Section 14 was read and passed without amendment." 1 PROCEEDINGS OF THE UTAH CONSTITUTIONAL CONVENTION 319 (1898) (recounting proceedings on March 25, 1895). Nonetheless, other considerations regarding the Convention's deliberations indicate that the framers did not intend to exclude reliable evidence from criminal trials. *See State v. Walker*, 2011 UT 53, ¶ 57, 267 P.3d 210, 223 (Lee, J., concurring) ("The drafting history of section 14 further undermines the conclusion that that provision would have been originally understood to incorporate an exclusionary rule").

[3.] UTAH CONST. art. I, § 5 guarantees the right to habeas corpus, a right not tied to trial procedures. Similarly, pre-trial procedures are discussed in art. I, § 8 (bail) and art. I, § 13 (prosecution by indictment or information); post-trial procedures are discussed in art. I, § 9 (no "cruel or unusual punishments"). The Declaration of Rights also contains a general due process clause, art. I, § 7, and a guarantee of the right to trial by jury, art. I, § 10.

The inspiration behind the Declaration of Rights came from the federal Bill of Rights. 2 PROCEEDINGS OF THE UTAH CONSTITUTIONAL CONVENTION 1847 (1898). However, it is also widely recognized that the drafters of the Utah Constitution borrowed provisions from other state constitutions. *See* John J. Flynn, *Federalism and Viable State Government -- The History of Utah's Constitution*, 1966 UTAH L. REV. 311, 324. Regardless of which constitution was the model for article I, section 14,[4] the judicial view in this country was contrary to an exclusionary rule. Indeed, at the time the Convention considered article I, section 14, no appellate court in any state excluded unlawfully obtained evidence under its constitution. *See* Cassell, *supra*, 1993 UTAH L. REV. at 803; *see also* Lester J. Mazor, *Notes on a Bill of Rights in a State Constitution*, 1966 UTAH L. REV. 326, 346 (The development of the federal exclusionary rule did not have "an antecedent in the language of a single state constitution, either as a result of amendment or the adoption of a new constitution"). Nor did the U.S. Supreme Court exclude evidence obtained in violation of the Fourth Amendment. That did not occur until almost twenty years later, in *Weeks v. United States*, 232 U.S. 383 (1914). Moreover, at the time of the Utah Constitutional Convention, the common law rule plainly admitted illegally-seized evidence. *See State v. Walker*, 2011 UT 53, ¶ 49, 267 P.3d 210, 221 (Lee, J., concurring) ("the historical record points decidedly against the conclusion that section 14 would have been understood in its historical context to call for an

[4] *See* Cassell, *supra*, 1993 UTAH L. REV. at 803 (arguing for Nevada's search and seizure provision as the model).

exclusionary remedy. That remedy, in fact, was virtually unknown at that time.").The United States Supreme Court, just a few years after Utah's 1895 Convention, explained the common law rule as follows: "Evidence which is pertinent to the issue is admissible, although it may have been procured in an irregular or even in an illegal manner." *Adams v. New York*, 192 U.S. 585, 596 (1904); *accord Regina v. Leatham*, [1861] 8 Cox C.C. 498, 501 (Crompton, J.,) (no exclusionary rule under English common law). *See generally* 24 A.L.R. 1408 (1923) (Annotation of the admissibility of evidence obtained by illegal search and seizure).

It is a standard rule of construction that legislators are aware of the common law and that their handiwork, if ambiguous, should be construed to follow that approach. *See American Bush v. City of South Salt Lake*, 2006 UT 40, ¶ 49, 140 P.3d 1235, 1249 ("this Court has often resorted to the common law in construing various provisions in the Utah Declaration of Rights"). The framers of the Utah constitution were well aware of common law principles and incorporated them into their Constitution. For example, delegate Charles S. Varian urged the convention to adopt language in article I, section 12 guaranteeing the right to confront adverse witnesses that was "within the ancient landmarks, so that every lawyer and every layman may know just what this does mean." 1 PROCEEDINGS OF THE UTAH CONSTITUTIONAL CONVENTION 307-08 (1898). The ancient landmarks at issue here

would block the suppression of reliable evidence because of mere objections how the police obtained it.[5]

C. Article I, Section 14 Is Not a Self-Executing Constitutional Provision

Article I, sec*tion* 14 is no*t a* "self-executing" CONstitutional provision in that it does contain a specific remedy for violations of its provisions. Yet the framers of the Utah Constitution were aware of the concept of "self-executing" constitutional provisions and knew how to draft such enforcement provisions when desirable. *See* Cassell, *supra*, 1993 UTAH L. REV. at 807-08. The reasonable inference is that the drafters designed article I, section 14 to be enforced through means other than those contained in the constitution.

This conclusion is confirmed by the subsequent action of the first Utah legislature, which provided specific criminal sanctions for unreasonable searches and seizures. The legislature adopted a misdemeanor offense covering any "person who maliciously and without probable cause shall procure a search warrant to be issued and executed . . . ." REVISED STATUTES OF UTAH § 5101 (1898). The legislature also enacted a law that "[a] peace officer who, in executing a search warrant, shall willfully exceed his authority or exercise it with unnecessary severity, shall be deemed guilty of a misdemeanor." *Id.*, § 5102. As for warrantless searches, another statute provided that "[e]very public officer . . . who under the pretense or color of any process or other legal authority, arrests any person or detains him

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[5] It is sometimes argued that history of anti-polygamy raids in Utah provides a basis for broadly interpreting art. I, § 14. The overwhelming difficulties with this position are discussed in Paul G. Cassell, *Search and Seizure and the Utah Constitution: The Irrelevance of the Antipolygamy Raids*, 1995 BYU L. REV.1.

against his will, or seizes or levies upon any property, or dispossesses any one of any lands or tenements, without a regular process or other lawful authority therefor, is guilty of a misdemeanor." *Id.*, § 4140. The legislature also adopted various criminal provisions that could be applied to official misconduct.[6]

At the same time as the first legislature adopted these criminal penalties for unreasonable searches and seizures, it did not create any right to exclude unlawfully obtained evidence at trial. Instead, it provided that "the rules of evidence in civil actions shall be applicable also to criminal actions, except as otherwise provided in this code." REVISED STATUTES OF UTAH § 5012 (1898).The rules for civil actions contained no exclusionary rule. *See id.*, §§ 2851-3757. The specific rules for criminal actions likewise did not authorize the exclusion of reliable evidence. The criminal rules were intended to be exhaustive: "All forms of pleading in criminal actions, and the rules by which the sufficiency of such pleading is to be determined, shall be those prescribed by this code." REVISED STATUTES OF UTAH §

[6.] Section 4691 provided that all state officers "not liable to impeachment" may be prosecuted criminally. Section 4153 forbade the "willful omission to perform any duty enjoined by law upon any public officer" and authorized a misdemeanor penalty. Section 4154 indicated that "where the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed by any statute, the doing of such act is a misdemeanor."

4728 (1898). The various pleadings concerning defenses that could be raised do not include a motion for suppression of unlawfully obtained evidence.[7]

To the extent that the rules adopted by the first legislature are silent on the existence of an exclusionary rule, the "gap filling" provisions in the Utah statutes suggest that no such rule existed. The first legislature provided that "[t]he common law of England, so far as it is not repugnant to, or in conflict with the constitution and laws of the United States, or the constitution and laws of this state, shall be the rule of decision in all the courts of this state." REVISED STATUTES OF UTAH § 2488 (1898). As noted earlier, the common law approach both in England and in this country was to admit relevant evidence even if illegally obtained.

The fact that the first Utah legislature created remedies for illegal searches has important constitutional implications. Utah has a scheme of clearly defined governmental responsibilities. Article V of the Utah Constitution divides the powers sharply:

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Under this system of sharply separated power, decisions regarding remedies reside with the Legislature. As this Court explained in an early decision, "The right and power, as well as the duty, of creating rights to provide *remedies,* lies with the Legislature, and not with the

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[7] *See id*., § 4770 (time to answer indictment or information "not less than one day"); § 4771 (when information must be set aside); § 4772 (when indictment must be set aside); § 4779 (grounds for demurring to an indictment); § 4799 (removal when impartial trial cannot be had); § 4845 (order of trial); § 5012 (rules of evidence same as in civil cases).

courts." *Brown v. Wightman*, 151 P. 366 (Utah 1915) (emphasis added). Moreover, any asserted judicial capacity to create remedies is limited by questions of institutional competence. As we discuss in Part V below, determining whether applying the exclusionary rule is appropriate requires weighing the costs and benefits -- the cost of lost convictions against the benefit of deterring unconstitutional searches and seizures. It also requires a substantive review of the availability and efficacy of other remedies for unconstitutional searches.

Given Utah's scheme of sharply separated powers, evaluating the competing concerns would seem to lie peculiarly within the province of the state legislature. The legislature has shown a willingness to provide remedies in this area from the first days of statehood, and nothing in this Court's opinions suggests that these actions were beyond the scope of legislative power. But if such remedies are within legislative competence, by definition under the Utah Constitution they are outside judicial competence.

D. If Article I, Section 14 Is Self-Executing, then the Self-Executing Remedy is a Tort Action Rather than Exclusion of Evidence.

For all the reasons just explained, the Council believes that article I, section 14 is not a self-executing constitutional provision. If the Court disagrees with this conclusion, however, it is clear that the remedy for a violation of the provision would not be suppression of reliable evidence, but rather a tort remedy. This is the conclusion of an important article that will appear shortly in the *Hawaii Law Review*, published by a recent distinguished graduate of the University of Utah College of Law. *See* Jeremy M. Christiansen, *State Search and Seizure: The Original Meaning*, 38 HAW. L. REV. (forthcoming 2016) (available

at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2525954). After examining the texts of all fifty search and seizure provisions in state constitutions, case law from the nineteenth and early twentieth centuries, and state constitutional conventions, Mr. Christianasen concludes that nearly every state shares a common original meaning when it comes to search and seizure provisions – i.e., an original meaning that provides "to every citizen, guilty or innocent, a self-executing, constitutional tort that protects interests of privacy, property, dignity, and reputation via compensatory and punitive damages. Courts should return to this original meaning so as to ensure that all citizens actually have the right to be free from unreasonable searches and seizures." *Id.* at 1. The Council believes that rather than suppressing reliable evidence of guilt as the remedy for a violation of article I, section 14, standard tort remedies would likely be applicable. But the Court need not reach the question of exactly what tort remedies are available to conclude in this case that an exclusionary remedy is unavailable.

III. CONTEMPORARY PUBLIC ATTITUDES REJECT AN INDEPENDENT STATE EXCLUSIONARY RULE.

From the above sources, it is clear that the intention of the drafters of the Utah Constitution in 1895 was not to allow the suppression of reliable evidence under article I, section 14 of the Utah Constitution. It is sometimes argued, however, that Utah's Constitution should be construed in light of contemporary public attitudes. *But see American Bush v. City of South Salt Lake*, 2006 UT 40, ¶ 57, 140 P.3d 1235, 1252 (construing Utah Constitution's freedom of speech provisions based on historical understanding); *State v.*

Walker, 2011 UT 53, ¶ 29, 267 P.3d 210, 216-17 (Lee, J., concurring) ("Originalism is more than just 'the dominant form of constitutional interpretation during most of our nation's history.' It is a theory that is essential to any system of government that finds its legitimacy in the will of the people as expressed in positive laws enacted by their representatives."). For the sake of completeness, this part demonstrates that in recent years, Utah's elected representatives have also rejected an exclusionary rule.

In 1982, the representatives of the citizens of the state overwhelmingly passed, and the governor approved, the "Fourth Amendment Enforcement Act." Fourth Amendment Enforcement Act of 1982, ch. 10, 1982 Utah Laws 84 (codified in scattered sections of Utah Code Ann). The Act created a civil cause of action against government agencies whose employees violated protected Fourth Amendment rights. At the same time, section five of the Act directly explained the legislature's intent to create a remedy for illegal searches that would "stand in lieu of the exclusion of evidence in criminal cases for violation of constitutionally protected rights except where those violations are substantial and peace officers were not acting in good faith." UTAH CODE ANN. § 78-16-1 (1982). The legislative history of the Act confirms that the legislature believed the exclusionary rule did not deter illegal searches[8] while at the same time was an obstacle to justice.[9] This Court ultimately

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[8.] The chief sponsor of the bill explained that "[t]he studies which were presented to the Interim Study Committee took the position and concluded . . . that the existing mechanism does not deter violation of the Fourth Amendment." House debate on H.B. No. 69 (Jan. 30, 1982), record #14, side 1 (remarks of Rep. McKeachnie).

declared the Act unconstitutional because of various procedural problems under the federal constitution. *See State v. Mendoza*, 748 P.2d 181 (Utah 1987).

In 1982, there was no state exclusionary rule and the Fourth Amendment Enforcement Act was targeted at the federal exclusionary rule. After the independent state exclusionary rule came into existence, amicus Utah Council on Victims of Crime asked its legislative supporters to work for a state constitutional amendment that would abolish the state exclusionary rule. In 1993, the result was Senate Joint Resolution No. 13, which passed the Senate by a vote of 22-1. UTAH SENATE J. 50th Leg., at 454 (1994). In the House Judiciary Committee, the argument was made that there was no need for legislative action in 1993, as the earliest the voters could approve the measure would be next election year. The Resolution was therefore tabled. UTAH HOUSE J., 50th Leg., at 647 (1994). In 1994, Senate Joint Resolution No. 1 was introduced. It provided in relevant part:

> Except as specifically provided by statute hereafter enacted, no evidence discovered in the course of a search or seizure shall be excluded under Article I, Sec. 14, Utah Constitution from any criminal or civil proceeding or trial if the search or seizure was conducted in conformity with standards, including good faith standards, established under the United Sates Constitution.

With the support of Attorney General Jan Graham, the measure passed the Senate by a vote of 24-4, UTAH SEN. J., 50th Leg., at 255-56 (1994), and the House Judiciary Committee by a

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[9.] *See* House debate on H.B. No. 69 (Jan. 21, 1982), record #2, side 1 (remarks of Rep. McKeachnie) ("The consensus of the Judiciary Committee was that [the exclusionary rule] is one of the largest loopholes to getting conviction of people who may be guilty of committing crimes. It's really a technicality, and the bill is an attempt to overcome it").

vote of 6-2. UTAH HOUSE J., 50th Leg., at 392 (1994). The measure, however, never obtained a floor vote.

These legislative actions confirm that in recent years Utah's elected representatives have not supported the suppression of reliable evidence in criminal proceedings, particularly where law enforcement officers have followed federal constitutional standards in obtaining the evidence.

IV. THE PRACTICES OF OTHER STATES DO NOT SUPPORT AN INDEPENDENT UTAH EXCLUSIONARY RULE.

This Court has also occasionally found it helpful to examine the interpretations of other state courts in interpreting the Utah Constitution. Indeed, the *Larocco* plurality took this approach, asserting that at the time the Supreme Court decided to impose a federal exclusionary rule on the states in *Mapp v. Ohio*, 367 U.S. 643 (1961), "more than half of [the states] were already voluntarily applying" the exclusionary rule. *See Larocco*, 794 P.2d at 472 (plurality opinion) (*citing Mapp*, 367 U.S. at 651, which in turn cited an appendix in *Elkins v. United States*, 364 U.S. 206, Appendix, pp. 224-232 (1960)). Even assuming that this calculation is correct -- and it appears that, in fact, the majority were generally against the rule[10] -- the fact remains that those decisions provide little analytic support for state

[10.] See Cassell, *supra*, at 1993 UTAH L. REV. at 793 n.272.

exclusionary rules. Many of those decisions simply followed the federal *Weeks* rule in "lockstep,"[11] an approach that this Court has eschewed in other contexts.

To bolster its argument, the *Larocco* plurality immediately added that "[a]t least eighteen states have adopted an independent state exclusionary rule." 794 P.2d at 472 (plurality opinion). Setting aside the obvious rejoinder -- 32 states have not adopted such a rule[12] -- this is tenuous support for a Utah exclusionary rule. To begin with, one can question the necessity for looking outside the borders of the state to resolve a question of Utah law where the Utah traditions are so clear. Moreover, many out-of-state decisions rest on considerations that are inapplicable to Utah.

For example, the Louisiana exclusionary rule is based on unique language in the Louisiana constitution, language not present in Utah's constitution. Article I, section 5 of the Louisiana Constitution (adopted in 1974) provides, after reciting a general prohibition of unreasonable searches and seizures: "Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the

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[11.] *See, e.g., Gore v. State*, 218 P. 545, 547 (Crim. Ct. App. Okla. 1923) ("if it appears that the highest court of the land has definitely fixed a rule applying to the introduction of evidence obtained by illegal seizure, it follows without argument that the rule of evidence in the state courts, where like facts and principles of law are involved, should conform to that settled by the court having supreme prestige and authority."); *State v. George*, 231 P. 683, 684-85 (Wyo. 1924) (adopting federal rule because "[t]he Constitution of the United States and the laws passed pursuant thereto govern the people of this state as much so as the Constitution and law of this state").

[12.] To be sure, many of the 32 states probably are following a lockstep approach to interpreting their state constitutions. But in doing so, they are implicitly rejecting an independent state exclusionary rule.

appropriate court." This implicitly recognizes an exclusionary rule. *See State v. Culotta,* 343 So.2d 977, 981 (La. 1977).

Similarly, the Washington exclusionary rule rests on specific language in its constitution and a drafting history behind that provision suggesting the appropriateness of a broad interpretation. Article I, § 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." In drafting this provision, the Washington Constitutional Convention of 1889 specifically declined to adopt the wording of the Fourth Amendment, preferring a broader formulation. *See State v. White,* 640 P.2d 1061, 1071 (Wash. 1982).

The Hawaii exclusionary rule likewise rests on specific drafting history supporting an exclusionary rule at the Hawaiian Constitutional Convention. *See Hawaii v. Polini,* 367 P.2d 499, 506 (Haw. 1961) (referring to Hawaii Constitutional Convention, Committee of the Whole Report No. 5, 1 Proceedings of the Constitutional Convention 301) (specifically indicating intent to adopt federal decisions creating an exclusionary rule). No comparable drafting history exists for Utah.

The Alaska exclusionary rule is based on a specific provision in the Alaska rules of evidence requiring exclusion of illegally obtained evidence. *See* ALASKA R. EVID. 412 ("Evidence illegally obtained shall not be used over proper objection by the defendant in a criminal prosecution for any purpose [except for certain purposes in perjury prosecutions]"); *see Harker v. Alask*a, 663 P.2d 932, 934 (Alaska 1983). In deciding search and seizure issues, the Alaska courts have also relied on the unique "character of life in Alaska," *Ravin v.*

State, 537 P.2d 494, 504 (Alaska 1975), and on the Alaska Constitution's explicit protection of a right of privacy, see ALASKA CONST. art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed"); *see, e.g., State v. Glass*, 583 P.2d 872, 874-82 (Alaska 1978) (interpreting this provision). The Utah rules of evidence contain no such provision and, indeed, provide exactly the opposite of the Alaska rule. *See* UTAH R. EVID. 402 ("*All relevant evidence is admissible*, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules . . . .") (emphasis added). *See generally* Cassell, *supra*, 1993 UTAH L. REV. at 833-36 (discussing how the Utah Rules of Evidence contradict an independent state exclusionary rule).

Other states have adopted an independent state exclusionary rule without any careful examination of the issues involved or their state's own history. A good illustration comes from New York, where early twentieth century case law, including a well-known decision penned by then-Judge Benjamin Cardozo, unambiguously rejected the exclusionary rule as a matter of statutory and common law, as well as federal constitutional law. *People v. Defore*, 242 N.Y. 13, 15, 150 N.E. 585, 587, *cert. denied*, 270 U.S. 657 (1926) ("There has been no blinking the consequences. The criminal is to go free because the constable has blundered."). In 1938, a constitutional convention was held when a state constitutional search and seizure provision was adopted. A proposal to engraft the exclusionary rule was rejected. *See People v. Johnson*, 66 N.Y.2d 398, 408-11 (1985) (Titone, J., concurring). Nonetheless, in 1985 the New York Court of Appeals decided to adopt its own exclusionary rule, thereby "amending the [New York] Constitution in a fashion explicitly rejected by the

delegates to the 1938 Constitutional Convention, and overruling three decisions *sub silentio.*" *Id.* at 408. Such judicial fiat provides little useful precedent for this Court interpreting the Utah Constitution; this Court has consistently recognized that the goal of state constitutional analysis "is to discern the intent and purpose of both the drafters of our constitution and, more importantly, the citizens who voted it into effect." *American Bush v. City of South Salt Lake,* 2006 UT 40, at ¶ 12, 140 P.3d at 1240.

V. AN INDEPENDENT STATE EXCLUSIONARY RULE CONSTITUTES BAD PUBLIC POLICY.

The previous sections of this brief have established that Utah's history and traditions stand opposed to an independent state exclusionary rule, as do the contemporary attitudes of its elected officials. These conclusions should be enough to establish that, as a matter of constitutional interpretation, there is no basis for an independent state exclusionary rule. For the sake of completeness, however, this section explains why an independent state exclusionary rule is bad public policy.

Of course, an assessment of an independent state exclusionary rule does not require any revisitation of the on-going debate concerning the *federal* exclusionary rule. It is enough for present purposes to note that the Fou*rth* Amendment exclusionary rule is generally justified as a deterrent to unlawful police behavior. In the words of *Mapp v. Ohio*, "the purpose of the exclusionary rule is to deter -- to compel respect for the constitutional guaranty in the only effectively available way -- by removing the incentive to disregard it." *Mapp,* 367 U.S. at 643; *see Sims v. Collection Div. of the Utah State Tax Comm'n*, 841 P.2d

6, 14 (Utah 1992) (plurality opinion) (observing that "one of the frequently cited purposes of the exclusionary rule is to deter future unlawful seizures"). On the other hand, critics of the rule believe that any deterrent effect is unproven, the sanction of the rule is disproportionate to the offense, and the costs of the rule (release of criminals because the "constable has blundered," *Defore*, 150 N.E. at 587 (Cardozo, J.).,) are too high, particularly in light of alternative remedies (such as civil suits) that could be made available. *See generally* Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 678-754 (1970).

Assuming arguendo that the justification for a federal exclusionary rule is a close call, the additional considerations against extending the rule at the state level are more than enough to tip the scales the other way. The *Utah* exclusionary rule is troublesome in at least three respects: (A) the state exclusionary rule is inconsistent with the central premise of the *Larocco* plurality opinion – i.e., that a need exists to simplify search and seizure law; (B) the state exclusionary rule is unlikely to produce any significant incremental deterrent effect beyond that created by the Fourth Amendment exclusionary rule; and (C) the state rule will typically operate in situations where its effect is disproportionate to the constitutional violation at hand.

A. An Independent State Exclusionary Rule is Inconsistent with Larocco's Purpose of Simplifying Search and Seizure Law

The germinal idea behind the *Larocco* plurality, first expressed in Justice Zimmerman's concurrence in *State v. Hygh*, was the need to develop "simpler rules that can be more easily followed by police officers and the courts." 711 P.2d 264, 272 (Utah 1985) (Zimmerman, J.,

concurring). Justice Durham expanded on this theme in her plurality opinion in *Larocco*, concluding: "The time has come for this court, in applying an automobile exception to the warrant requirement of article I, section 14 of the Utah Constitution, to try to *simplify*, if possible, the search and seizure rules so that they can be more easily followed by the police and the courts and, at the same time, provide the public with consistent and predictable protections against unreasonable searches and seizures." 794 P.2d at 469 (plurality opinion) (emphasis added).

Far from simplifying the law, an independent exclusionary rule doubles the confusion. The Arizona Supreme Court has pithily noted that "one of the few things worse than a single exclusionary rule is two different exclusionary rules." *State v. Bolt*, 689 P.2d 519, 527 (Ariz. 1984) (holding that Arizona's exclusionary rule is no broader than the federal exclusionary rule); *see also People v. Oates*, 698 P.2d 811, 825 (Colo. 1985) (Rovira, J., dissenting) ("The law of search and seizure and the accompanying exclusionary rule is difficult enough to apply with but one line of authority to follow -- that of the United States Supreme Court. To add a separate line of authority under the state constitution compounds the difficulty immeasurably."); *People v. Disbrow*, 545 P.2d 272, 284 (Cal. 1976) (Richardson, J., dissenting) ("The vagaries and uncertainties of constitutional interpretations, particularly in the Fourth and Fifth Amendment sectors of our criminal law, are the hard facts of life with which the general public, the courts, and law enforcement officials must grapple daily. This condition necessarily breeds uncertainty, confusion, and doubt. It will not be eased or allayed by a proliferation of multiple judicial interpretations of nearly identical language.");

John K. Van de Kamp & Richard W. Gerry, *Reforming the Exclusionary Rule: Analysis of Two Proposed Amendments to the California Constitution*, 33 HASTINGS L.J. 1109, 1121 (1982) (criticizing independent California decisions because "[t]hese two tiers of constitutional interpretations can only complicate the police officer's task of understanding what the law requires").

The confusing effects of independent state standards enforced via a state exclusionary rule become immediately apparent when one recognizes that Utah's law enforcement officers are often involved in joint federal-state investigations and prosecutions. For example, the official website for the U.S. Attorney's Office for the District of Utah describes "Utah Project Safe Neighborhood" as a partnership "among federal, state, and local law enforcement agencies and prosecutors." https://www.justice.gov/usao-ut/project-safe-neighborhoods (visited April 28, 2016). Even apart from cases that directly involve federal law enforcement agencies, Utah's law enforcement officers often wind up in federal court where only federal standards apply. For example, many drug offenses investigated initially by state law enforcement agencies – including in particular many traffic stops -- are also prosecuted in federal court because of stiff mandatory-minimum sentences prescribed for violations of federal drug laws. *See* Cassell, *supra*, 1993 UTAH L. REV. at 838-40. The state officer making the stop, of course, cannot be sure, at the time that search and seizure issues arise, whether the case will be prosecuted in state or federal court. The flip side of this problem is when a federal law enforcement officer applies for a search warrant in state court. "Federal drug agents cannot, and should not, be expected to know the individual

constitutional requirements in each and every state. Because of the need for uniformity in the law, decisions of the United States Supreme Court that directly affect interstate drug trafficking should be approached with deference." *See Oates*, 698 P.2d at 822 (Erickson, C.J., dissenting).

Whatever one thinks of independent interpretation of state constitutional provisions, clearly the "simplest" approach is not to create a state exclusionary rule. This would avoid litigation over compliance with state constitutional provisions in criminal proceedings. In response, it might be argued that a certain amount of complexity is a necessary incident of interpreting state constitutions independently from the federal approach. Perhaps this rejoinder is true, but the limited point here is that, from a public policy perspective, simplification of search and seizure law would be promoted best by abolishing Utah's independent exclusionary rule.

B. A State Exclusionary Rule is Unlikely to Generate an Incremental Deterrent Effect Beyond the Fourth Amendment Exclusionary Rule

From a public policy perspective, it is also unclear what benefit comes from an independent state exclusionary rule. Presumably the justification for such a rule is to deter police misconduct. But the deterrent effect of a federal exclusionary rule is already highly debatable. It seems to be clear that "[n]o one actually knows how effective the [federal] exclusionary rule is as a deterrent." Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 55. Then-Professor Dallin H. Oaks' study of the deterrent effect, although conducted in the late 1960's, still remains the classic in the field and could not

demonstrate a deterrent effect. *See generally* Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

Regardless of whether the federal exclusionary rule deters, however, claims about the desirability of a state exclusionary rule must be evaluated against the backdrop of this federal rule. Any suggestion that the absence of a state exclusionary rule will "turn the police loose" to abuse citizens is demonstrably false because the Fourth Amendment exclusionary rule, which applies to all state prosecutions, remains in place regardless of how a state constitution is interpreted. In virtually all instances of abusive police conduct to which a state exclusionary rule would apply, the *Mapp* exclusionary rule applies as well.

What is at issue in a state exclusionary rule debate is whether to extend the exclusionary sanction to a limited subcategory of state constitutional violations: violations in which officers offend the state constitution but not the federal constitution. The conditions surrounding this subset of violations are extremely unlikely ones for deterrence.

To begin with, "[t]he deterrent effectiveness of the exclusionary rule is also dependent upon whether the arrest and search and seizure rules that it is supposed to enforce are stated with sufficient clarity that they can be understood and followed by common ordinary police officers." Oaks, *supra*, 37 U. CHI. L. REV. at 731. Different state constitutional rules will, by definition, be conflicting and uncertain, as they will conflict with federal constitutional principles that the United States Supreme Court has announced. Justice Stewart articulated the problem very nicely when he observed:

> Indeed, in the context of state search and seizure law as applied in routine traffic stops of vehicles, I have previously taken the position that this Court

> ought not embroider the margins of an already highly complicated area of the law by creating relatively insignificant departures from federal search and seizure law simply because some comparatively minor aspect of that law seems to be ill-founded or inconsistent with other federal law. Further complicating an already extremely intricate and complex area of the law would, in my view, not only have the adverse effect on law enforcement of compounding confusion in that area of the law but, more importantly, it would undermine the very liberty values that the search and seizure provisions of the Utah and federal constitutions are designed to protect.

State v. Anderson, 910 P.2d 1229, 1240 (Utah 1996) (Stewart, J., concurring in the result).

A good illustration of the problems comes from the *Larocco* case itself. In the interests of "simplifying" the law, the *Larocco* plurality announced the requirement that vehicle searches must be conducted pursuant to a warrant when practical. *Larocco*, 794 P.2d at 469-70 (plurality opinion). The plurality, however, would allow warrantless searches when justified by "exigent circumstances" such as the need "to protect the safety of police or the public or to prevent the destruction of evidence." *Id.* at 470 (plurality opinion).

Assuming that the plurality opinion gains a third vote and becomes the law of the state (another issue about which state law enforcement officers must speculate), development of the precise contours of the "exigency" exception will likely take years of litigation. A critical question is whether the relative mobility of a vehicle is itself enough of an "exigency" to justify a warrantless search? If so, the exigency "exception" might swallow the general "warrants when practicable" rule in the context of car searches. Yet the mobility of vehicles has long been recognized as an "exigent" circumstance. *See State v. Limb*, 581 P.2d 142, 144 (Utah 1978) (automobile exception to the warrant requirement applies where "there is probable cause to search an automobile stopped on the highway; the car is movable,

the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained") (quoted with apparent approval in *Larocco*, 794 P.2d at 470).

However this concept develops in this state, it is likely to be less clear than federal standards. Utah already suffers from a relatively paucity of published case authority. *See State v. Gardiner*, 814 P.2d 568, 570 n.1 (Utah 1991). In contrast, federal search and seizure principles are subject to interpretation by at least a dozen federal courts of appeal, hundreds of federal district court judges, and the state courts in all the states. This generates a body of case law that can be much more readily applied, even when the United States Supreme Court announces a new constitutional principle.[13]

Deterrence from an independent state exclusionary rule is also unlikely for another reason. Then-Professor Oaks explained that deterrence is implausible where there are "competing norms of police behavior." Oaks, *supra* , 37 U. CHI. L. REV. at 727. Oaks cited several studies that reported police officers often felt justified in violating search and seizure principles. Such competing police norms seem particularly likely to develop where the United States Supreme Court has expressly sanctioned the officer's behavior.

A final reason for the lack of deterrent effect to independent state rules is the possibility of avoiding the state rules by "going federal." It appears to be a generally

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[13.] For example, the *Larocco* plurality criticized the Supreme Court's decision in *California v. Carney*, 471 U.S. 386 (1985). *Larocco*, 794 P.2d at 469. Yet whatever its faults, *Carney* generated discussion in at least 75 places in published opinions in just its first three years, including references in 10 federal circuits and 17 states (Utah among them). *See* 12 SHEPARD'S UNITED STATES CITATIONS (Supp. 1986-88) (cases citing *Carney*).

accepted principle of the deterrence literature that certainty of punishment is an important factor in establishing a sanction's deterrent effect. Yet state law enforcement officers who obtain evidence in violation of an independent state constitutional rule remain free to use that same evidence in a federal prosecution. *See, e.g., United States v. Morehead*, 959 F.2d 1489 (10th Cir. 1992). Many serious crimes violate both federal and state criminal laws. *See, e.g.*, *United States v. Bryan David Mitchell and Wanda Eileen Barzee*, No. 2:08-CR-125 (D. Utah 2008) (federal indictment charging federal kidnapping charges in Elizabeth Smart case, paralleling state charges). It seems likely that this possibility of state officers serving illegally seized evidence to federal authorities on a "silver platter"[14] undercuts the deterrent effect of any independent state exclusionary rule.

C. A State Exclusionary Rule is Likely to Operate in Situations Where it is Disproportionate to the Constitutional Violation

The federal exclusionary rule has been criticized because of the disparity between the "offense" of an insubstantial constitutional violation and the "penalty" of releasing a guilty criminal. The classic statement of the critique comes from Chief Justice Burger's dissent in *Bivens*, where he argued that although "[f]reeing either a tiger or a mouse in a schoolroom is an illegal act, . . . no rational person would suggest that these two acts should be punished in the same way." *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting).

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[14] *Cf. Elkins v. United States*, 364 U.S. 206 (1960) (repudiating then-existing "silver platter" doctrine which allowed evidence illegally seized by state officials in violation of the Fourth Amendment to be used in federal courts).

He concluded that "society has [a] right to expect rationally graded responses from judges in place of the universal 'capital punishment' we inflict on all evidence when police error is shown in its acquisition." *Id.* at 419. This Court, too, has also recognized that exclusion of evidence can be a disproportionate sanction in some instances. *See, e.g., State v. Fixel*, 744 P.2d 1366, 1369 (Utah 1987) ("suppression of evidence obtained as a result of Guinn's illegal investigation would be a remedy out of all proportion to the benefits gained to the end of obtaining justice while preserving individual liberties unimpaired") (internal citation omitted).

This criticism has lead to several proposals for reforming the exclusionary rule. For example, the American Law Institute (ALI) has suggested limiting the rule to situations involving a "substantial" violation of a constitutional right. *See* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Proposed Official Draft 1975) § SS 290.2. In contrast, the great irony about Utah's exclusionary rule is that it will operate *only* in those situations where the suppression of evidence is likely to be a disproportionate response to the constitutional violation. Utah's independent state exclusionary rule functions exclusively in areas where the United States Supreme Court has approved the law enforcement conduct in question. In other words, it takes effect only in circumstances where reasonable minds can differ -- specifically, where at least five justices of the United States Supreme Court have found the search or seizure to be "reasonable" and thus constitutional under the Fourth Amendment.

On the other hand, the "cost" of applying the exclusionary rule in these situations is the suppression of reliable evidence with the possible, if not probable, consequence of the release of a guilty criminal – something of special concern to amicus Utah Council on Victims of Crime. Thus, in *Larocco*, the state was unable to retry Larocco, and a car thief escaped justice; and in *Thompson*, the state could not retry the two defendants, who had been convicted of five counts of bribery, one count of antitrust violation, and one count of racketeering, and they went free as well. *See* Cassell, *supra*, 1993 Utah L. Rev. at 849.

In short, Utah's exclusionary rule will generally produce unjust results. It will come into play only when the police conduct has been approved by the United States Supreme Court; and yet the sanction will be the "single, monolithic, and drastic judicial response" *Bivens v. Six Federal Narcotics Agents*, 403 U.S. at 418 (Burger, C.J., dissenting), of suppression of reliable evidence – leaving the general public and crime victims to bear the costs.

CONCLUSION

This Court should abolish the independent state exclusionary rule. Doing so would greatly reduce the litigation involving article I, section 14, as criminal defendants would no longer have standing to raise state constitutional claims in criminal cases – including defendants like appellees Rowan and George. Abolishing the exclusionary remedy, however, would in no way eliminate this Court's ability to independently interpret article I, section 14. All that would change is the remedy for enforcing the right. Instead of suppressing reliable evidence of the guilt of criminals, the state constitutional right could be

enforced in traditional ways – such as civil and administrative remedies. *See generally* Cassell, *supra*, 1993 UTAH L. REV. 849-58 (discussing alternatives to the suppression of evidence for enforcing the state search and seizure provision); Jeremy M. Christiansen, *State Search and Seizure: The Original Meaning*, 38 HAW. L. REV. (forthcoming 2016) (surveying all fifty states and finding that state constitutional search seizure provisions where historically understood as being enforced in ways that protected the rights of *all* citizens, not just those who had committed crimes) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2525954). These are the same remedies that courts use to enforce other parts of the Utah Constitution, such as article I, § 15's protection of freedom of speech and of the press and article I, § 4's protection of religious liberty. If traditional remedies work to secure these precious constitutional liberties, they should likewise secure the rights found in article I, section 14.

Indeed, if anything, reliance on the exclusionary rule has led to *under*protection of state constitutional rights. This Court has focused exclusively on exclusionary remedies to enforce article I, section 14. *Cf. State v. Hygh*, 711 P.2d at 273 (Zimmerman, J., concurring) ("This Court has never considered the appropriateness of possible exceptions to the exclusionary rule or the availability of alternative or supplemental remedies . . . ."). By definition, the exclusionary rule can provide redress only to guilty criminals who seek to exclude evidence of their guilt in criminal trials; the rule does *nothing* for innocent persons whose rights have been violated. *Cf.* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994) (Under the federal exclusionary rule, "criminals go free,

while honest citizens are intruded upon in outrageous ways with little or no real remedy."). Indeed, the sad fact is that the state exclusionary rule has effectively transformed article I, section 14, from a right of all the people of the state into a right that exclusively protects those involved in crimes. This is not a result envisioned by either the drafters of Utah's Constitution or the state's contemporary elected representatives.

For the foregoing reasons, amicus Utah Council on Victims of Crime respectfully requests the Court to reverse the judgment of the trial court on the grounds that article I, section 14 of the Utah Constitution does not permit the exclusion of reliable evidence.

Respectfully submitted,

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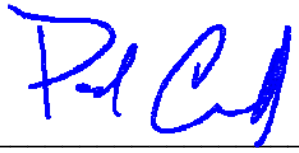
CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 9,914 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.



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I hereby certify that on May 3, 2016, I served two copies of the foregoing Brief of Amicus, including a courtesy brief on CD in searchable portable document format (pdf), upon counsel of record as follows:

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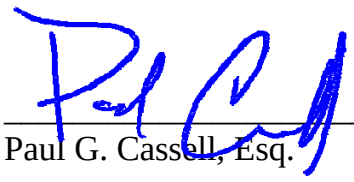

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